Supreme Court, U. S.
FILED
OCT 21 1976
MICHAEL RODAK, JR., CLERK

No. 76-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

RIEGEL TEXTILE CORPORATION, *Petitioner,*

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Did the court below properly interpret and apply a contract of indemnity in holding petitioner liable thereunder?

STATEMENT OF THE CASE

The respondent, Central of Georgia Railway Company (Central), is a common carrier operating in the states of Alabama, Georgia and Tennessee. On De-

cember 30, 1966 an employee, J. P. Steed, was injured during a switching operation that was being conducted within the plant of and over railroad tracks owned and maintained by petitioner, Riegel Textile Corporation (Riegel), at Trion, Georgia. At the time of the accident, Steed was riding on the side of a railroad hopper car which derailed due to dirt and debris which Riegel had permitted to accumulate over the rails. Steed was caught between the railroad car and a concrete platform which ran parallel to the track. Steed filed suit against Central in the Alabama courts, basing his action on the Federal Employers' Liability Act, Title 45, U.S.C.A. § 51. Central sent Riegel a notice of the suit and a request to defend, which Riegel chose not to do.

Central, anticipating possible liability to Steed, then filed a third party complaint against Riegel based on a contract of indemnity which was in effect between them. The contract provided, in relevant part, as follows:

> "2. The Tenant (Riegel) will pay for, own, maintain the entire track from the point of switch to the end of the track . . . .
>
> "4. If the Tenant fails to maintain said track in safe operating condition as prescribed by the Railway, the Tenant agrees that the Railway may put it in repair at the Tenant's expense, or may discontinue operating thereover. . . .
>
> "9. The Tenant also agrees to indemnify and hold harmless the Railway from loss, damage or injury from any act or omission of the Tenant, its employees or agents to the person or property of the parties hereto and their employees and if any claim or liability other than from fire shall arise from the joint or concurring negligence of the parties hereto, it shall be borne by them equally."

Riegel then removed the cause to the United States District Court. That court retained jurisdiction of Central's indemnity action against Riegel (on diversity grounds) but remanded Steed's case against Central to the Alabama court. In that court, Steed obtained a judgment against Central, which was affirmed on appeal by the Supreme Court of Alabama. *Central of Georgia* v. *Steed,* 287 Ala. 64, 248 So. 2d 110 (1971) (Pet. App. A-31-A-57).

After Central's liability to Steed was thus established, Central moved in the district court for summary judgment against Riegel. The district court granted the motion, but its judgment was reversed and remanded by the court below (Pet. App. A-24-A-30) on the ground that the district court had failed to provide either a key to the facts which it considered important, or its rationale in granting summary judgment.

On remand, and after a full evidentiary trial, the district court granted Central's motion for a directed verdict and, responding to the prior opinion of the court of appeals, entered full findings of fact and conclusions of law. The court below affirmed (Pet. App. A-1-A-12). A petition for rehearing *en banc* was denied.

ARGUMENT

I

There Is No Conflict of Decisions

Although the petition filed in this case ranges widely among Federal Employee Liability Act cases, they quite literally have nothing to do with the issue here—the interpretation and application of the indemnity agreement between the parties. In essence, the court below held that "if Central was found liable to Steed

in the prior action based upon its nondelegable duty [under FELA] to provide a safe place to work, then Riegel would be liable under the indemnity agreement" (Pet. App. A-9)—that is, that "Riegel's liability to Central, under the indemnity agreement, must be determined by the law making Central liable to Steed" (*ibid.*).

The decision follows an earlier decision by the same court (*Miller and Co. of Birmingham* v. *Louisville & N. R. Co.*, 328 F.2d 73 (1964)), and the decisions of other courts of appeal construing and applying essentially similar indemnity contracts are in accord. See *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, 183 F.2d 902 (9th Cir. 1950); *Chicago, R.I. & P. R. Co.* v. *Dobry Flour Mills, Inc.*, 211 F.2d 785 (10th Cir. 1954); *Baltimore & Ohio R. Co.* v. *Alpha Portland Cement Co.*, 218 F.2d 207 (3d Cir. 1955); *Seaboldt* v. *Pennsylvania R. Co.*, 290 F.2d 296 (3d Cir. 1961). Petitioner has cited no cases to the contrary. Moreover, the Georgia courts (the accident occurred in Georgia) are also in accord. *Georgia Ports Authority* v. *Central of Georgia Ry. Co.*, 219 S.E.2d 467 (1975).

Petitioner, referring to the fact that Central was held liable to Steed, asserts that this should relieve it of one-half of the liability under the provision of the indemnity agreement which provides for division of liability when it arises from "joint or concurrent negligence of the parties." The court below, following the decision in *Booth-Kelly Lumber Co.* v. *Southern Pacific Co., supra*, properly rejected the argument, as had the Georgia court in *Georgia Ports Authority* v. *Central of Georgia Ry. Co., supra*. The statement in *Booth-Kelly,*

construing a similar indemnity contract, provides the rationale (183 F.2d at p. 907):

> "Basic in any determination of the meaning of this whole paragraph is an understanding that when the parties contemplated that there might be claims for indemnity they must have been cognizant of the fact that in the ordinary case the occasion for seeking indemnity would not arise unless the indemnitee had himself been found guilty of some fault, for otherwise no judgment could have been recovered from him. That this is typically true is recognized in the comment under Section 95, Restatement on Restitution, as follows: 'In all of these situations the payor is not barred by the fact that he was negligent in failing to discover or to remedy the defect as a result of which the harm was occasioned; in most of the cases it is because of this failure that he is liable . . . .'"

Here, as the court below pointed out, and as the district court had found (Pet. App. A-12)—

> ". . . Central's liability to Steed, as indicated above, was based on its nondelegable duty to provide its employee with a safe place to work.
>
> "Nor was there a jury issue established with respect to negligence on the part of Central which could have come within the 'equal shares' provision of the agreement. It is clear that the accumulation of dirt and debris on the track area for which Riegel was responsible was the cause of the derailment and subsequent injury and that, prior to the derailment, no member of Central's crew, other than Steed, saw or was in a position to see the accumulation which caused the derailment. There was no sustantial evidence from which a jury might have inferred that the engineer was guilty of any negligence which proximately caused the injury. It is additionally clear that there were no

defects in the derailed car which might have caused or contributed to the derailment. There is thus no substantial evidence on any issue from which a jury might have determined that Central was entitled to anything other than full indemnity from Riegel."

II

There Are No Other Bases for Granting the Writ

As indicated above, petitioner seeks by abundant reference to FELA cases to suggest that an interpretation of that Act and its standards is involved here. It *was* involved in the action by Steed against Central, but it has no application whatever to Central's claim against Riegel under the contract of indemnity. The long discussion of FELA cases in the petition (pp. 26-40) is simply irrelevant.

Petitioner also apparently seeks (see petitioner's Appendix A-58-A-85) to have this Court review the record of the two trials and to reverse findings of fact by the district court that have been reviewed and approved by the court below in a unanimous decision. That is not a basis for a writ of certiorari. See *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275; *Berenyi* v. *District Director of Immigration*, 385 U.S. 630.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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